SUPREME COURT, U. S.

JUN 27 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 299

BORDEN CABINET CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARTHUR C. NORDHOFF,
202-203 Kuebler Bldg.,
Jasper, Indiana,

FRED P. BAMBERGER,
708 Hulman Bldg.,
Evansville, Indiana,

ROBERT H. HAHN,
708 Hulman Bldg.,
Evansville, Indiana,
Attorneys for Petitioner.

Of Counsel:

NORDHOFF & NORDHOFF,
202-203 Kuebler Bldg.,
Jasper, Indiana,

BAMBERGER, FOREMAN, OSWALD AND HAHN,
708 Hulman Bldg.,
Evansville, Indiana.

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Borden Cabinet Corporation (hereinafter called "Petitioner") prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board against the Petitioner.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board entered June 24, 1966 (R. 71 to 75), are reported at 159 N. L. R. B. No. 99. The opinion of the United States Court of Appeals for the Seventh Circuit entered April 12, 1967 (Appendix A, *infra*, pp. 13 to 19) is reported at ..... F. 2d .....

JURISDICTION.

The judgment and decree of the United States Court of Appeals for the Seventh Circuit was entered on May 1, 1967 (Appendix A, *infra*, pp. 13 to 19). The jurisdiction of this Court is invoked under 62 *Stat.* 928 (28 U. S. C. Sec. 1254(1) and under 61 *Stat.* 136, as amended (29 U. S. C. Sec. 160(e)).

QUESTION PRESENTED.

Whether Petitioner had a duty to recognize and bargain with the Union[1] on May 24, 1965, under Section 8(a)(5) of the Act, after the Union had asserted that a majority of Petitioner's employees had signed union authorization cards, even though the Union had been rejected by a majority of Petitioner's employees in a Board conducted election held on March 5, 1965, and the question as to the validity of that election was still unresolved at the time the Union demanded recognition.

FEDERAL STATUTES INVOLVED.

The primary statutory provisions involved are Sections 8(a)(5), 9(c)(1) and 9(c)(3) of the Labor Management Relations Act (hereinafter called the "Act"). 61 *Stat.* 136, as amended (29 U. S. C. Sec. 158(a)(5), 159(c)(1) and 159(c)(3)). All pertinent parts of the Act appear in Appendix B, *infra*, pp. 20 to 21.

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1. International Union of District 50, United Mine Workers of America.

STATEMENT.

On the 5th day of March, 1965, the Union was rejected by Petitioner's employees in a Board conducted election (R. pp. 52-53 and p. 77). Immediately thereafter, the Union began campaigning among Petitioner's employees, attempting to persuade a majority of its employees to sign union authorization cards. The union cards introduced before the Trial Examiner all bear dates between March 5 and May 20, 1965 (R. p. 65 and pp. 79-87). On May 20, 1965, the Union alleged that a majority of Petitioner's employees had signed union authorization cards and so stated in a letter addressed to Petitioner dated May 20, 1965 (R. pp. 65-66 and p. 88). Petitioner answered the Union's demand for recognition by letter dated May 24, 1965, and stated, in essence, that it could not recognize the Union since it had been rejected by a majority of Petitioner's employees in the election held approximately one and one-half months prior to May 20, 1965 (R. pp. 66 and 90).

It stands uncontradicted in the record that at the time Petitioner refused to recognize and bargain with the Union, the results of the election held on March 5, 1965, had not been determined with finality; objections to that election filed by the Union were still pending (R. p. 66).

The decision and order of the Board was rendered on June 24, 1966. In this decision and order the Board found that Petitioner's refusal to recognize and bargain with the Union on May 24, 1965, was violative of Section 8(a)(5) of the Act and ordered Petitioner to bargain with the Union on request. A chronological statement of the proceedings resulting in this order and decision follows.

On June 30, 1965, General Counsel filed its consolidated complaint charging violation of Section 7, Section 8(a)(1) and Section 8(a)(5) of the Act. Rhetorical paragraph 8

of said complaint asserted that at all times since May 5, 1965, the Union had been the exclusive collective bargaining representative of Petitioner's employees, and rhetorical paragraph 10 alleged that Petitioner had at all times since May 20, 1965, refused to bargain collectively with the Union for the purpose of undermining the Union's majority status. It is the finding with respect to these allegations which is herein challenged.

On March 9, 1966, the Trial Examiner issued his decision in the above proceedings, finding that Petitioner had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, and recommending further that the election held on March 5, 1965, be set aside and a new election held. The Trial Examiner also found that Petitioner had not engaged in certain other unfair labor practices and recommended that those allegations of the complaint be dismissed. Thereafter, General Counsel filed limited exceptions to the Trial Examiner's decision, one of which challenged the Trial Examiner's finding that Petitioner did not violate Section 8(a)(5) of the Act by refusing on May 24, 1966, to recognize or bargain with the Union. As noted above, this portion of the Trial Examiner's decision was then modified by the Board in its decision and order rendered on June 24, 1966. The Board overruled the Trial Examiner's order that another election be held and ordered Petitioner to recognize the Union as the collective bargaining representative of its employees.

On April 12, 1967, the Seventh Circuit Court enforced the order of the Board holding, in essence, that Section 9(c)(3) of the Act did not relieve Petitioner of its duty to recognize and bargain with the Union pending a determination as to the validity of the March 5, 1965, election.

REASONS FOR GRANTING THE WRIT.

1. In the case at bar, the Seventh Circuit has decided a federal question of labor law not heretobefore determined by this Court or expressly presented to any federal court outside of the Seventh Circuit which involves a new interpretation of Section 9(c)(3) of the Act and which will undoubtedly have a tremendous impact on labor relations throughout the country.[2] This petition has been filed not because of a conflict within the circuits—though one is very likely to arise—but because the Seventh Circuit has nullified the congressional intent of Section 9(c)(3) and has created a novel bargaining duty on the part of employers. Under these circumstances, this Court should render a decision accepting or rejecting the Seventh Circuit's conclusion so that the legislative branch of our government can immediately decide whether or not Section 9(c)(3) should be amended.

The Seventh Circuit's decision herein is similar to and is based in large measure on its recent decision in *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d 173 (7th Cir., 1966). Quite frankly, this Court recently denied certiorari in the *Conren* case, ... U. S. ..... (35 Law Week 3329). However, because of Petitioner's sincere and honest belief that a decision by this Court on the question herein presented is of manifest importance, this petition has been filed despite the recent action in *Conren*. Perhaps the *Conren* petition did not make clear the implications of the Seventh Circuit's interpretation of Section 9(c)(3). Furtheremore, this case serves to illustrate the immediate effect of the *Conren* doctrine on other employers in different circumstances.

In its *Conren* decision, the Seventh Circuit held that

2. Section 9(c)(3) provides: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held."

Section 9(c)(3) of the Act, which provides for a one year period between elections, does not relieve an employer of his duty to recognize a union which has established a majority by the use of authorization cards under Section 8(a)(5) of the Act, even though a valid election has been held within the preceding year.

In the present case, the Seventh Circuit has held that an employer is required to recognize a union which has allegedly established a majority through authorization cards approximately one and one-half months after it has been rejected in an election and while objections to that election are pending at the time of the demand. Pursuant to the *Conren* doctrine, the ultimate outcome of the election is of no consequence, since an election does not bar a union from demanding recognition on the basis of cards. The Seventh Circuit has, in effect, authorized a union to participate in an election and, if it loses, to secure a majority by the use of cards immediately thereafter. The *Conren* doctrine has been taken one step further in the case at bar to the point where it is now unlawful for an employer to even await the outcome of an election before granting or refusing to grant recognition on the basis of cards.

It is, of course, not the purpose of this petition to extensively argue the case on the merits; nevertheless, the theory underlying the Seventh Circuit's decision must be briefly referred to in order to fully comprehend the inauspicious consequences that court's decision will have on the industrial stability aspect of labor relations. In determining that Section 9(c)(3) of the Act did not relieve Petitioner of its duty to bargain with the Union, even though requested to do so while objections to an election in which the Union had been rejected were pending, the Seventh Circuit simply relied upon the *Conren* decision in support of its interpretation of Section 9(c)(3). The Court's major premise in *Conren* is that the one-year rule of

Section 9(c)(3) is confined to elections only, not to authorization cards, and that it would be a usurpation of a legislative prerogative to limit the use of authorization cards to conform to Section 9(c)(3) of the Act. Petitionr respectfully disagrees.

Under the Wagner Act, the Board was authorized to hold secret ballot elections or to "utilize any other suitable method" of determining employee desires as to union representation when a question of representation existed. *Section 9(c) National Labor Relations Act.* In addition to secret elections, the principal method used by the Board under the Wagner Act was the so-called cross-check of the signature on union authorization cards against an employer's payroll. But the Labor Management Relations Act permits the Board to resolve representation cases only by secret ballot election. In other words, as the Act now stands the Board is directed to conduct an election when a "question of representation exists." *Section 9(c)(1) Labor Management Relations Act.* The language of the Wagner Act authorizing the use of "any other suitable method" was omitted from Section 9(c) when the law was amended. Representation proceedings under the Act refer to elections and nothing more, and it is only elections which are regulated by the Act. Petitioner respectfully submits that the learned Seventh Circuit erred when it concluded that the language of Section 9(c) indicated, ". . . that Congress was aware of the alternative methods of establishing . . . union representative status, but . . . concerned itself only with limiting the frequency of Board . . . conducted elections. . . ." *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d at 174 (7th Cir., 1966).

Certainly Congress confined the language of Section 9(c)(3) to elections, because the election process is the only representation proceeding regulated under Section 9(c) of the Act after its 1948 amendment, and Petitioner

earnestly submits that the right of the judiciary to regulate the use of cards so as not to conflict with the policy of Section 9(c)(3) can be established if given the opportunity to argue the case on the merits.

The Seventh Circuit's decision in the case at bar presents a totally new concept relative to organizational drives. To Petitioner's knowledge, no case has been reported since the 1948 amendment to the Act in which a union has attempted to circumvent the purpose and policy of Section 9(c)(3) as was done in the instant case until 1966, when the *Conren* decision was reported. A complete lack of union activity in this regard indicates an assumption by labor as well as management that the prohibition of Section 9(c)(3) would likewise be applied to authorization card campaigns.

If allowed to become established precedent, the immediate ramifications of the Seventh Circuit's decision are easily and dramatically foreseeable, as the following, few examples illustrate:

(1) Even though accepted as being a secondary and less reliable means of determining the desire of employees for union representation, the use of authorization cards is encouraged over the election process by being allowed when an election would be prohibited.

(2) The entire election process will become pointless since a rejected union can begin a card campaign and demand recognition immediately after any election.

(3) What happens when a union, rejected in an election, demands recognition two weeks thereafter on the basis of cards but the employer has a legitimate good faith doubt that the union represents a majority? Ordinarily an election would be directed; but under these circumstances another election could not be held for one year by virtue of 9(c)(3) and the parties come to an absurd impasse.

(4) A double standard is created among management and labor, to-wit: management being bound for one year by an election while labor is not.

(5) Industrial stability—the primary reason behind the enactment of Section 9(c)(3)—is destroyed with endless card campaigns every time a union is rejected in an election.

The above examples plainly reveal the complete state of confusion which will no doubt result from the Seventh Circuit's decision, and as the late Justice Robert Jackson once remarked, "Chaos serves no social end."[3] Petitioner submits that these future consequences of the instant decision magnify the urgent necessity for a decision by this Court on the merits.

2. Having in mind the fourth and fifth examples set out above, Petitioner calls this Court's attention to its decision in *Brooks* v. *N. L. R. B.*, 348 U. S. 96, 103 (1954). Admittedly, the specific holding in the case at bar is not in direct conflict with *Brooks;* however, the Seventh Circuit's decision is certainly at odds with the rationale underlying this Court's decision in *Brooks.*

A union was certified as the result of an election in *Brooks.* One week after the election the company received a petition from a majority of its employees to the effect that the employees did not desire union representation. This Court held that the union must be recognized as the employees' representative for a period of one year after the election, notwithstanding the petition of the employees. The heart of the Court's reasoning, as expressed by Justice Frankfurter, was:

"* * * The underlying purpose of this statute is in-

3. Justice Jackson's dissenting opinion in *State Tax Comm. of Utah* v. *Aldrich,* 316 U. S. 174, 185 at page 196. Though the case is unrelated to that before the Court, Justice Jackson's succinct but accurate observation is particularly apposite.

> dustrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of electrons, with a view of furthering industrial stability and with due regard to administrative prudence."

The Seventh Circuit's opinion undermines the stated purpose of Section 9(c)(3). It is inconceivable that there can now be industrial stability if a rejected union is allowed to begin a card campaign immediately after an election and demand recognition on the basis of cards thus obtained one and one-half months after the election and while objections to that election are still unresolved.

CONCLUSION.

Petitioner respectfully submits that a decision by this Court on the novel question presented is needed to specifically determine what effect Section 9(c)(3) of the Act has on union authorization card campaigns and to eliminate the confusion which has been and will continue to be created by the Seventh Circuit's decision in this regard. A decision by this Court affirming or overruling the Seventh Circuit's unique decision is required not only for the benefit of the many employers who will be affected by the flood of card campaigns which, most assuredly, will be forthcoming once the Seventh Circuit's interpretation of 9(c)(3) is circulated, but also to enable Congress to utilize a Supreme Court decision on this very important question to determine whether an amendment to the Act is necessary. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR C. NORDHOFF,
202-203 Kuebler Bldg.,
Jasper, Indiana,

FRED P. BAMBERGER,
708 Hulman Bldg.,
Evansville, Indiana,

ROBERT H. HAHN,
708 Hulman Bldg.,
Evansville, Indiana,
Attorneys for Petitioner.

Of Counsel:
NORDHOFF & NORDHOFF,
202-203 Kuebler Bldg.,
Jasper, Indiana,

BAMBERGER, FOREMAN, OSWALD AND HAHN,
708 Hulman Bldg.,
Evansville, Indiana.